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Supreme Court, U.S.
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In the Supreme Court of the United States

No. 436 October Term, 1971

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

EMHART CORPORATION,
Appellant

MOTION TO DISMISS OR AFFIRM

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Appellant

MOTION TO DISMISS OR AFFIRM

Appellee moves that the present appeal be dismissed or that the final judgment of the Supreme Court of Pennsylvania be affirmed on the ground that the appeal does not present substantial federal questions.

I. STATEMENT

The Commonwealth accepts the statement of the facts of the case to the extent as stated in Appellant's Jurisdictional Statement. The Commonwealth, in addition, submits that the record in the case states that Appellant was a large industrial corporation with several divisions and producing a variety of products ranging from firearms to architectural hardware. For the purpose of the Pennsylvania Corporate Net Income Tax, Appellant has conceded that all divisions and foreign and domestic subsidiaries constitute a unitary business enterprise (R. 13a).

Appellant has never questioned the allocating percentage computed from the apportionment fractions and is attempting solely to eliminate capital gains in excess of $13,500,000 from the statutory tax base. By applying the admitted allocating percentage to this portion of the tax base, an additional tax of only $21,000 is obtained. Appellant does not question the large block of Monsanto stock which remains in its possession until the present date and other securities owned by it. Further the cash dividends received by Appellant from the Monsanto stock were retained and utilized by Appellant for general corporate purposes (R. 12a).

The opinions of the Common Pleas Court of Dauphin County and the Supreme Court of Pennsylvania sustaining the Commonwealth's tax were made by a unanimous court with two justices not partici-

pating in the Supreme Court of Pennsylvania and one judge not participating in the Common Pleas Court opinion. Appellant never petitioned the Supreme Court of Pennsylvania for a rehearing although such proceeding is specifically provided for in the Rules of the Pennsylvania Supreme Court (Rule 71, Pennsylvania Supreme Court Rules).

II. QUESTION PRESENTED

Can a corporate taxpayer eliminate from a statutory tax base the capital gain proceeds from the sale of intangible assets where the assets and proceeds contributed substantially to a scheme of corporate functioning and the business potency of the corporation within the taxing jurisdiction and the additional tax constituted less than one-fifth of one percent of the gain realized?

III. THE FEDERAL QUESTION PRESENTED IS NOT SUBSTANTIAL

1. The decision below is based substantially on the facts as stipulated by the parties, the legal precepts being clear and not in dispute.

It is conceded that where a state taxing statute utilizes as a tax base income returned to and ascertained by the Federal Government that income which bears no relationship to the franchises or privileges granted by the state must be excluded from this tax base. Upon the facts as presented to the lower courts, the opinions were unanimous that the gain from the sale of the intangible assets in question could not be so excluded by the Appellant. Each case raising similar issues will be decided primarily upon the facts as presented by the parties. Therefore, a further determination in the instant case would not act as binding precedent for any case either from the Commonwealth of Pennsylvania or any other state taxing jurisdiction.

The Pennsylvania taxing statute does provide for an apportionment fraction and in the instant matter such fraction was computed at .027475 percent, an amount not disputed by Appellant. Applying this fraction to the gain in question and thereafter applying the Pennsylvania tax rate produced additional Pennsylvania tax in the approximate amount of $21,000. This is to be compared against the capital gain

in question, in excess of $13,500,000. Since the Pennsylvania Supreme Court found as a fact that the proceeds from the sale of the asset contributed substantially to a scheme of corporate functioning or the business potency of Appellant, the application of the Pennsylvania apportionment fraction was proper and entirely constitutional.

This Court has held that in order to breach alleged constitutional safeguards the misapportionment of tax must be palpable, and the burden is on the corporate taxpayer to satisfy that exacting test. *Underwood Typewriter v. Chamberland,* 254 U.S. 113 (1920). The Pennsylvania courts, without dissent, found that there was no palpable misapportionment and that Appellant had clearly failed to meet its burden of proof. Although the record does state that the gain was taxed in the state of incorporation, and most probably in many other states, there is no claim, nor basis for a claim, that Pennsylvania's tax is confiscatory or that the total taxes imposed exceed the gain itself. Obviously such is not the case.

Appellant avers that the Uniform Division of Income for Tax Purposes Act would cure the alleged inequity in the instant case. Pennsylvania has most recently, March 1971, enacted a Corporation Income Tax incorporating many of the features of this act including distinguishing between business and non business income.[1] The act in question in the instant case will no longer be a part of the Pennsylvania tax scheme beginning with the year 1971. Thus, the

[1] Act of March 3, 1971, P. L. 5, 72 Purdon Statutes 7101 to 8203, Article IV.

opinion in the instant case would no longer be precedent in Pennsylvania since the tax act in question has been eliminated.

Contrary to Appellant's assertions before this court, the Pennsylvania courts found as facts that the gain in question was business income, was related to the Pennsylvania activities and therefore properly in the statutory tax base. By applying the unquestioned apportionment fractions to this gain, the proper tax for Pennsylvania purposes is computed.

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2. The decision below was proper on the facts submitted. It was in conformity with the tax act and consistent to other decisions of this Court and the Pennsylvania Supreme Court.

Since the Pennsylvania Supreme Court concluded on the facts as submitted that the income in question was business income and substantially related to the Pennsylvania franchises and privileges granted Appellant, Appellant's present argument based on facts not found or concluded by the lower court is inappropriate.

The Pennsylvania Supreme Court in a most recent decision has come to an opposite conclusion in a case raising identical issues because of the facts and conclusions drawn therefrom. In *Commonwealth v. ACF Industries, Inc.*, 441 Pa. 129 (1970), the corporate taxpayer argued that gain from the sale of intangible assets should be excluded from the Pennsylvania income tax base. The Pennsylvania Supreme

Court reversed the Commonwealth Court of Dauphin County and held that upon the facts as presented in that case, the corporate taxpayer had met its burden of proof by establishing the lack of connection between the income generated and the Pennsylvania activities.

The Pennsylvania Supreme Court has come to different conclusions based on facts in earlier cases raising similar issues. For example in *Commonwealth v. Minnesota Mining and Manufacturing Co.*, 402 Pa. 612 (1961), the court refused to eliminate from the tax base income generated from foreign patents, royalties and management fees.

It has been held that where intangibles enter into the exercise of a franchise conferred by the state or privileges actually exercised within the state, the value of such intangibles may properly be included in the tax base. *Newark Fire Insurance Company v. Board of Tax Appeals*, 307 U.S. 313, 319, 321 (1938). Further the burden is on the taxpayer to show by clear and cogent evidence that the taxing formula results in extra territorial values being taxed. *Butler Brothers v. McColgan, Franchise Tax Commissioner of California*, 315 U.S. 501 (1941). In *Stone v. Stapling Machines Co.*, 71 S. 2d 205 (1954), appeal dismissed 348 U.S. 802 (1954), it was stated:

> "Where the situs of the intangibles is confined to the domicile of the owner, they are of course taxed at his domicile. 'But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state,

> in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax'. Curry v. McCandless, 307 U.S. 357, 59 S. Ct. 900, 906, 83 L. Ed. 1339."

The additional tax imposed by the Commonwealth of Pennsylvania is less than one-fifth of one percent of the gain realized by Appellant on the sale of stock in question. This by itself negates any claim by Appellant that the tax was fundamentally improper.

IV. CONCLUSION

The appeal in question raises issues which are predominately determined by the facts of each case. The legal precepts are not in dispute. The amount of tax being contested is nominal compared to the gain realized by Appellant and there is no question as to the proper apportionment of this gain to the Pennsylvania activities of Appellant.

The Commonwealth respectfully submits that the appeal of Appellant should be dismissed and the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,
EDWARD T. BAKER
Deputy Attorney General
Counsel for Appellee